DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2800

Federal Land Policy and Mangement Act; Management of Rights-of-Way and Related Facilities on Public Lands and Reimbursement of Costs

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rulemaking.

SUMMARY: This proposed rulemaking establishes procedures for the management of all rights-of-way on public lands except for: oil, natural gas and petroleum product pipelines; Federal Aid Highways; cost-share roads; and access to mining claims. Title V of the Federal Land Policy and Management Act of 1976 gives the management responsibility for these rights-of-way to the Secretary of the Interior.

DATE: Comments by January 7, 1980.

ADDRESS: Send comments to: Director (650), Bureau of Land Management, 1800 C Street, N.W., Washington, D.C. 20240. Comments will be available for public review in Room 5555 at the above address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Robert C. Bruce, 202-343-8735, or Bob Mollohan, 202-343-5537.

SUPPLEMENTARY INFORMATION: The principal author of this rulemaking is Robert E. Mollohan, Division of Rights-of-way and Project Review of the Bureau of Land Management, assisted by the Division of Legislation and Regulatory Management, Bureau of Land Management, and the Office of the Solicitor, Department of the Interior.

The Bureau of Land Management, in a coordinated joint effort with the Forest Service, invited public participation in developing regulations under title V of the Federal Land Policy and Management Act of 1976 by issuing a preproposed outline of procedures for granting rights-of-way on November 14, 1977, which invited written comments. Four public meetings were also held to obtain public input.

Title V of the Federal Land Policy and Management Act replaces most of the Bureau of Land Management's previous authority for granting rights-of-way, and provides broad discretionary power to the agency in developing current policies and procedures for carrying out that authority. This proposed rulemaking varies significantly from the previous regulations in that title V of the Federal Land Policy and Management Act combined and condensed various separate Acts dealing with specific types of rights-of-way. This combining promotes uniform right-of-way provisions for the majority of public and private users. In addition, title V of the Federal Land Policy and Management Act made its statutory provisions applicable to both the Bureau of Land Management and the Forest Service, encouraging the two agencies to jointly develop a common system for granting rights-of-way.

Joint agency staff teams developed an outline of suggested common right-of-way grant procedures. The outline was distributed on November 14, 1977, to user groups, States and other involved governmental agencies, and interested public and private groups. The Bureau of Land Management and the Forest Service recognize the efforts and appreciate the thoughtful comments of the many participants in this joint rulemaking process. This proposed rulemaking is addressed only to public lands administered by the Bureau of Land Management. The Forest Service has developed a separate, but similar set of regulations that apply to lands in the National Forest System.

The Bureau of Land Management, in addressing these comments, found it impractical to respond to each separate comment and instead, has addressed the more repetitive and significant comments as follows:

Comment: Several industry groups urged the development of separate regulations designed specifically for their particular needs.

Response: The Federal Land Policy and Management Act mandates that right-of-way grants be authorized on the basis of the needs and circumstances peculiar to each right-of-way, including location, ground to be occupied, duration and terms and conditions. If separate regulations were developed for different industry groups, the specific needs of each grant might not be complied with, but narrowly limited. To be fully satisfactory, the right-of-way granted would have to be adequate for the most demanding circumstance that might occur, and specialized regulations would defeat this purpose.

Separate regulations for classes of industries, rights-of-way or uses according to size are infeasible and would be arbitrary in terms of application requirements. The initial Outline of Proposed Procedures illustrated this problem. It mentioned all of the possible disclosure requirements that might be necessary under any circumstance. The comments requested less stringent requirements be implemented in the regulations.

In the past, Bureau of Land Management right-of-way regulations were highly detailed and contained much procedural guidance, mandatory terms, widths and durations. This was necessary to accommodate the many specific authorities that the Federal Land Policy and Management Act repealed. Because the Act is a broad, general authority, we have been able to substantially shorten and simplify the regulations. Where necessary, additional guidance will be provided to the field in the Bureau Manual. Manuals are written in relatively broad terms for systemwide guidance but are frequently supplemented at the State Offices to achieve consistency along with appropriate adaptation to local conditions.

The rulemaking also encourages applicants to contact local Bureau of Land Management Offices prior to applying for instructions and guidance.

Comment: Several States and the Federal Highway Administration pointed out that the Federal Land Policy and Management Act did not preclude grants for highway purposes under sections 107 and 317 of title 23 of the United States Code. They added that the grants made by the Department of Transportation under title 23 have satisfied their needs on national forest lands.

Response: The Forest Service plans to continue its current practice of consenting to appropriation of highway rights-of-way by the Federal Highway Administration. The Bureau of Land Management will continue to use its existing regulations (43 CFR 2821) at this time and will review the Forest Service approach for Federal Aid Highways.

Comment: Owners of private lands intermingled with public lands wanted a perpetual easement across public lands appurtenant to the private lands served.

Several cited situations where local statutes require permanent access prior to allowing subdivisions of private land. Others cited the need for permanent access to obtain mortgage loans.

Response: Access rights-of-way across public land to reach intermingled private lands posed a substantial problem for the authors of the regulations. While several objectives can be stated, specific details will have to be developed in the cost-share and reciprocal right-of-way regulations that will follow. The cost-share and reciprocal right-of-way programs are in effect where intermingled private lands are managed for long-term timber production primarily in the Pacific Northwest. However, intermingled

private lands, some with subdivision potential, occur in all the western States. For these lands, effective coordination with local governments is imperative before granting significant access rights-of-way. Local planning and zoning, the opportunities for inclusion in the county road system and provisions that guarantee effective, long-term road maintenance must be analyzed thoroughly before making a long-term or perpetual commitment of public lands. Access roads to individual private land owners is a new authority for the Bureau of Land Management.

Nothing in this proposed rulemaking serves to prevent matching the applicant's needs with public land management objectives and the public interest to the extent possible under the Act.

Comment: The mining industry requested clarification of whether authorizations for roads and other access facilities to mining claims would be covered in the proposed rulemaking.

Response: The right of ingress and egress for access roads and other facilities to mining claims is authorized by the Mining Law of 1872. Language differences between the Forest Service Organic Act of 1897 and the Federal Land Policy and Management Act necessitate different provisions in the Bureau of Land Management and Forest Service regulations.

Parties exercising rights of ingress and egress on lands in the National Forest System must, in accordance with the Act of June 4, 1897, ". . . comply with the rules and regulations covering such national forests." The Forest Service will continue its present procedure of approving the miner's operating plan and granting rights-of-way under the Federal Land Policy and Management Act for access structures (roads, trams, etc.) to be constructed off the mining claim.

The Bureau of Land Management's authority in this area rests in section 302(b) of the Federal Land Policy and Management Act. It states, "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." Access facilities to unpatented mining claims will be authorized under the new surface management regulations (43 CFR Subpart 3809) requiring an approved mining plan, to regulate mining activities which are being developed.

Comment: Several electric utilities objected to issuance of rights-of-way by the Bureau of Land Management as well as a license from the Federal Energy Regulatory Commission for elements of the same hydroelectric project.

Response: Section 510 of the Federal Land Policy and Management Act mandates that hereafter no right-of-way for the purposes listed shall be granted across public lands except under the provisions of title V. Only two exceptions are made, the Act of October 13, 1964, and sections 107 and 317 of the 1958 Highway Act. Section 511 requires that applicants seeking a license, certificate or other authority from another agency which involves a right-of-way over, upon, under or through public lands must simultaneously apply to the Secretary of the Interior for the appropriate authority to use public lands and submit to the Secretary all information furnished to the other Federal department or agency.

The regulatory authorities and responsibilities of the Federal Energy Regulatory Commission are specifically preserved in section 501(a)(4) of the Federal Land Policy and Management Act. The Act specifically includes "systems for generation, transmission and distribution of electric energy" under its authority but additionally requires . . . that the applicant shall also comply with all applicable requirements of the Federal Power Commission (now FERC) under the Federal Power Act of 1935 (16 U.S.C. 791). Duplication of requirements is minimized to the extent possible in the proposed rulemaking, e.g., land rentals shall not be duplicated.

Comment: The bulk of the comments expressed a desire that decisionmaking authority be at the local level, where practical. On the other hand, comments indicated concern that broad discretionary authority could be abused by individual line officers, resulting in unreasonable interpretation of criteria and a wide variation of decisions. Some comments suggested local expertise and on-the-ground knowledge were necessary; others suggested higher level management review of decisions to assure adequate expertise and consistency.

Response: The proposed rulemaking recognizes the need for both local expertise and uniform decisions. Uniformity could be obtained by extremely detailed regulations designed to cover all contingencies. However, this would eliminate flexibility needed to respond to specific circumstances. The proposed rulemaking establishes a basic process which will be supplemented with suitable guidance through Manuals and training at the local level. Local level officials are trained to achieve efficiency and consistency in right-of-way authorizations. Opportunities for abuse of discretion are limited. Even within this framework, the authorized officer has discretion within his decisionmaking to allow flexibility for case-by-case analysis. When conflicts arise, the proposed rulemaking provides that appeals may be taken to the Interior Board of Land Appeals.

Comment: A vast number of comments requested a faster, more streamlined process, particularly for small projects with little environmental impact.

Response: In order to expedite the application process, we have encouraged proponents to utilize pre-application consultations with local Bureau of Land Management officials to enable the applicant and agency personnel to understand each other's needs and discuss information required for processing an application. Application processing can be scheduled during initial contacts and data gathering and planning can be streamlined by avoiding the gathering of unnecessary information. A tentative schedule based on applicant needs, workload, environmental sensitivity of the public lands involved and adjacent lands, project complexity and the quality of inventories and land use plans will serve to avoid agency delays and unattainable expectations by applicants. Also, since the proposed rulemaking provides a basic process which may be supplemented, the action on a project can be tailored to its particular needs and circumstances.

Comment: Most comments expressed support for the pre-application process described in the outline. Several pointed out the need for confidentiality for some information regarding early plans or proposals.

Response: The proposed rulemaking provides for confidentiality when requested to the extent reasonable and consistent with the Freedom of Information Act.

Comment: The largest number of comments received concerned the amount of detailed material that might be required from an applicant prior to receiving a right-of-way grant. Comments urged that only minimal information be required to identify the applicant, disclose plans, financial and technical capability and describe the rights and privileges requested. The comments further visualized the creation of a vicious cycle where a grant would not be made until another agency had issued some necessary permit or clearance and that agency would not act until the right-of-way had been granted.

Response: The Oil and Gas Pipeline Right-of-Way Act of 1973 upon which title V of the Federal Land Policy and Management Act was patterned,

contains stringent, mandatory disclosure requirements of applicant organization and associated plans, contracts and agreements. Title V contains similar language except that many requirements are imposed only when necessary to make a determination as to whether a right-of-way shall be granted and the terms and conditions to be included.

The Outline of Joint Procedures attempted to show a distinction between mandatory requirements and other material that might be necessary because of circumstances. Readers, however, assumed that agency officers would automatically require all possible information without regard to its usefulness. The legislative history provides guidance in this area. The Senate Report states that information already on file need not be refiled and explains the required public disclosure of the ownership and control of business entities as follows:

"Requiring disclosure is based upon the principle that the Federal Government should know the true identity of the entity and individuals applying for permission to use the national resource lands." The House Report states, "The committee expects the Secretaries to be cautious in their demands for information. They are expected to seek only the minimum amount of information essential for making the determinations required by law."

The proposed rulemaking is based on the premise that the authorized officer shall require only as much information as is necessary to assure that the applicant is a legal business entity possessing the technical and financial capability to construct, operate and maintain the proposed project. The findings of Public Utility Commissions, the Federal Energy Regulatory Commission and the Interstate Commerce Commission may be used in lieu of a finding by the authorized officer. Information already on file need not be refiled. To minimize duplication, copies of pertinent information submitted to other agencies for associated permits and clearances can be submitted to the Bureau of Land Management.

Since organizational structure frequently changes over time, grants to those other than individuals will normally include a requirement that the holder provide details of its organizational structure upon demand of the authorized officer.

Unless the issuance of associated clearances is questionable or the public lands may be subject to unnecessary environmental impacts by the use requested by the applicants, rights-of-way will normally be granted subject to the issuance of required associated clearances and permits.

The pre-application procedure is designed to bring the applicant and the agency together much earlier than in the past to encourage an understanding of each other's needs and capabilities. Thereafter, the process is a mutual effort to determine what disclosures may be needed, the information and data necessary for environmental analysis, and acceptable alternatives. Environmental analysis will frequently be based upon conceptual plans and maps to be followed by such detailed plans, surveys, and standards as are determined necessary.

Comment: Many comments urged that the regulations impose time limits on the agencies for processing applications.

Response: Problems arise involving the extended time factors inherent in complying with applicable statutes, including the National Environmental Policy Act, the National Historic Preservation Act, and the Rare and Endangered Species Act. In addition, consultation with local government agencies, and other interested agencies and parties is required prior to issuing a grant. There is also the added time factor of reviewing each application on a case by case basis to determine the varying and specialized requirements and needs of each proposed grant. These variables make it impractical to impose set deadlines on processing of applications. However, the Bureau of Land Management realized the necessity of streamlining the application process to meet the applicant's needs.

As stated in the House Report: "The Committee considered putting time limits on the Secretaries, requiring final action within a specified period after filing an application. It decided, however, to grant the Secretaries flexibility in this respect. It expects them, however, to take *every reasonable step to assure action at the earliest practical time."* (emphasis added).

Early contact and mutual coordination in the pre-application process will actively involve prospective users in the land use allocation and planning process. When land use plans fully consider right-of-way needs, processing of individual projects can be expedited. For example, many considerations will have been predetermined during the planning of a designated right-of-way corridor. In addition, the expense and time of false starts can be avoided.

A deliberate effort has been made to limit the application process and reduce the burden on the users. For example, disclosures are limited to the minimum necessary to comply with the statutes and good business practices; and project details, plans and surveys need only be commensurate with project size and complexity, anticipated impacts and the commitment of lands and resources requested. Public involvement will be tailored to the impacts and interests involved. Applications can be processed while associated permits and clearances are being obtained or grants can be approved subject to their issuance. Also, early notification and provisions for cost reimbursement will relieve the agencies of budget restrictions and improve scheduling.

Comment: The Outline of Joint Procedures provided for the issuance of temporary use permits to allow an applicant to enter upon the public lands to gather information. Many objected to, or indicated the need for clarification of this provision.

Response: The proposed rulemaking allows for the casual use of the public lands without specific authorization for reconnaissance and data gathering purposes, where little if any surface disturbance will occur. However, under this proposed rulemaking, where the authorized officer determines that surface disturbing activities will take place during the process of reconnoitering and gathering information, the proponent must apply for a temporary use permit and be granted the permit prior to occupying the public lands.

Comment: A few comments stated that the purpose of the Federal Land Policy and Management Act was to grant, not deny, rights-of-way. One comment suggested that denials be limited to Congressionally designated areas, e.g., Wilderness. Many expressed concern for appeal rights when applications are denied.

Response: The Federal Land Policy and Management Act provides that a decision of whether or not a right-of-way should be granted and the determination of terms and conditions rests within the Secretary's authority. The regulations amplify on this provision of the Act. The regulations state that it is the policy of the Secretary under these regulations to grant rights-of-way within the constraints of sound land management practices and environmental considerations to any qualified applicant.

The Federal Land Policy and Management Act and other special public land use authorities provide permissive authorities that may be used to accommodate the needs of other Federal agencies, State and local governmental agencies, individuals and groups, only when they are in, or at least do not obstruct, the public interest, and

will comply with the objectives and policies for which the lands are managed and all applicable statutes. The proposed rulemaking provides an appeal procedure for denials.

Comment: Many electric utilities objected to the so-called "wheeling" provisions in the proposed outline for power transmission lines of 66 KV or higher.

Response: The House Report indicated that the committee reviewed the policy requiring holders of transmission line rights-of-way to make excess capacity available for wheeling of power from other systems. The committee rejected suggestions to modify this policy and stated "the action by the committee is to be considered a specific endorsement and support of . . ." this policy. Accordingly the wheeling provisions are included in this proposed rulemaking unchanged except to reflect the transfer of the Power Marketing Administration to the Department of Energy.

Comment: Comments regarding terms and conditions of a grant varied greatly. In substance, many urged totally unconditioned grants. Several wanted all conditions expressed in regulation and no latitude in their application. Others urged selective application.

Response: Section 504(e) of FLPMA provides for regulations with respect to terms and conditions and for regular revision of such regulations. It goes on to state that such regulations shall be applicable to every right-of-way granted or renewed under title V. Section 505 requires that each right-of-way shall contain terms and conditions and provides criteria for such terms and conditions. The proposed rules closely parallel sections 504 and 505. The proposed rulemaking makes certain terms and conditions mandatory, while allowing the authorized officer to choose other terms and conditions necessary to satisfy the public interest and applicable statutes for each case. Upon acceptance by the applicant, the grant becomes a binding agreement.

Comment: Several comments expressed concern about possible interpretations of the requirement of payment for mineral and vegetative materials removed, used or destroyed to accommodate a right-of-way. For example, one comment urged that no payment be required for the mere dislodging of minerals.

Response: Contrary to several statutes now superseded by the Federal Land Policy and Management Act, the Federal Land Policy and Management Act does not convey any rights to timber and mineral materials through a right-of-way grant. Removal, disposal or use of such materials must be authorized under applicable laws and the authorization of the authorized officer.

The Senate Report states that a right-of-way holder may not use mineral or vegetative materials without obtaining an authorization under applicable law to do so. The report further states:

"This does not prevent the holder from excavating for construction purposes and using or moving earth and non-merchantable vegetation and disposing of them in approved locations. . . . It merely requires the holder to purchase mineral materials, such as gravel, and vegetative materials, such as timber, where the sale of such materials is authorized or otherwise required by statute or regulation."

The regulations concerning materials and timber on public lands appear in 43 CFR Parts 3600 and 43 CFR 5400 and 5500, respectively. Instructions concerning sales, charges and free use are covered in these cited parts.

Comment: A few comments suggested that right-of-way holders pay for loss of wildlife habitat caused by their use.

Response: Under existing authorities, payments of this nature would be deposited to the Treasury. It is better to require appropriate mitigation measures. Properly designed and located rights-of-way often enhance wildlife habitat through furnishing needed variety of forage and valuable "edge effect" for wildlife. In addition, revegetation and other mitigating measures are carefully designed to protect wildlife habitat. Replacement of wildlife habitat lost to water development projects may be required under existing statutes.

Comment: Several comments demanded that environmental analyses and the decision whether or not to authorize a project consider only the project itself and not related activities made possible by virtue of the grant, e.g., private land development.

Response: Considerations under the National Environmental Policy Act are not limited to a proposal by itself. Agencies are to use all practical means to foster the general welfare, crate and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations. Environmental analyses should consider both primary and secondary consequences, favorable and adverse effects, irreversible and irretrievable commitments of resources and cumulative impacts. Although emphasis is placed upon on-site impacts, all potential environmental consequences must be addressed. It is appropriate to illuminate off-site consequences. The Federal Land Policy and Management Act requires that right-of-way grants contain terms and conditions to "(i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto."

It is clear that the Congress is as concerned with consequential effects on land adjacent to a right-of-way as it is with consequential effects of activities related to a right-of-way grant on public lands. Valid rights of third parties cannot be abridged. The terms and conditions mandated by title V of the Federal Land Policy and Management Act require compliance, and any activity affecting the right-of-way grant on public lands or adjacent lands is an integral part of the grant and must comply with the terms and conditions.

Comment: A few of the comments expressed concern at right-of-way width requirements and several comments objected to precise survey requirements for determining boundaries.

Response: These concerns are addressed in the legislative history. The Senate Report states, "The Committee intends that all rights-of-way granted under this title be *limited* to the minimum amount of land reasonably necessary for the conduct of the particular project activity involved" (their emphasis). Also, "the Committee has consciously avoided establishing arbitrary width limitations because experience has shown that they are not a practical guide to environmentally sound construction design; they are not amenable to technological change; and they limit the Secretary's discretion and ability to cope with unique circumstances."

Regarding surveys, the Senate Report states, "Subsection (a). This subsection provides that the Secretary shall specify the boundaries of each right-of-way as precisely as is practicable. The Committee expects that the Secretary will exercise considerable flexibility in weighing the merits of each situation. Expensive and highly precise surveys are not normally required for many rights-of-way, such as low standard logging spurs or livestock driveways.

Thus, it is expected that the Secretary will weigh the proportionate values involved when determining the appropriate level of accuracy in setting such rights-of-way boundaries."

On the same subject, the House Report states: "The Secretaries are authorized to specify the boundaries of rights-of-way and limit the grant to the project facilities and such additional lands as are necessary for operation and maintenance and to protect the environment. The purpose of this is to permit identification of the lands in the right-of-way on the ground with such degree of precision as may be needed in each case. The requirement is not meant to suggest that the outside boundaries of a right-of-way have to be surveyed or even marked although there may be cases where this will be needed.

The present requirements of the Secretary of the Interior for location of center lines and for measurements therefrom will probably meet the objectives of adequate specification of boundaries in many cases."

The proposed rulemaking does not establish predetermined widths or areas for any right-of-way grant or temporary use permit. Width and area determinations will be at the discretion of the authorized officer.

In order to maintain the integrity of the public land records and protect holder's right, the proposed rulemaking contains a requirement that all authorizations granted must be surveyed and a map prepared. Map requirements are minimal, thereby eliminating the need for expensive surveys.

Comment: Many comments addressed the limited duration of the grant as provided in the proposed regulations. Most utilities recommended a 50-year term. Other users suggested that a perpetual grant was appropriate for many rights-of-way, especially certain types of roads. Comments emphasized that duration for any particular kind of use must fully accommodate the needs of all such cases. It appeared that these users were requesting that the duration of grants be fixed by regulation.

Response: Section 504(b) of the Federal Land Policy and Management Act states "Each right-of-way or permit granted, issued or renewed . . . shall be limited to a reasonable term in light of *all circumstances concerning the project.*" (emphasis added). The Act goes on to list several criteria to be used in making the decision, but implicit in the language is a case-by-case analysis. The section further provides that the right-of-way shall specify whether it is or is not renewable and the terms and conditions applicable to the renewal. Title I of the Federal Land Policy and Management Act provides that although particular parcels may be disposed of in the national interest, the public lands will be retained in Federal ownership and be managed on the basis of multiple use and sustained yield. Future uses of the public lands are to be projected through a land use planning process. Title II provides guidance for land use planning and the issuance of decisions to implement the plans. However, such decision ". . . shall remain subject to reconsideration, modification and termination through revision . . ." of the land use plan. To respond to this direction, right-of-way grants need to retain reasonable opportunity to adjust to change.

The legislative history is helpful. The Senate Report states: "One purpose of this section is to give the holder . . . a degree of certainty and security as to his tenancy so that adequate financing can be arranged. This is particularly necessary for major projects. In certain instances, due to the very long term nature of . . . investments . . . it may be appropriate to specify a length of term which is very long or even perpetual. In such cases, there should be *provisions for review and revision of terms and conditions* to reflect changing times and condtitions." (emphasis added).

The House Report states: "The requirement that the terms of a right-of-way be 'limited to a reasonable term' does not prevent the issuance ". . . for indefinite terms, the exact duration of which will be contingent on continuation of specific events or circumstances." Two examples are given—a timber road could be issued for "so long as the lands served by it are managed for long term timber production"; and a reservoir could be authorized for, ". . . . so long as the power is produced in commercial quantities." The report goes on to state, "an alternative would be to provide in the right-of-way a right of renewal so long as the same contingencies exist."

The preproposed rulemaking has been modified to determine the duration of a right-of-way grant on public lands based on: (1) a term which is no longer than is necessary to accomplish the purpose of the authorization, (2) a term which is reasonable in light of all circumstances concerning the proposed continued use, and (3) project financing which may require an identified duration. Long term authorizations (those exceeding 20 years) may provide within the granting instrument terms for revision at specified times to provide an opportunity to reflect changing circumstances.

Given the thrust of the Federal Land Policy and Management Act for matching duration to the needs of individual projects and the wide variety of local situations, it is felt that setting maximum terms in the regulations is inappropriate. Guidance in deciding duration will be in agency manuals, which are public documents. Decisions of the authorized officer are subject to review at higher levels and judicial review if necessary.

Response: Several comments were made on the need for criteria for deciding if rights-of-way were in conflict with wilderness study areas and "areas of critical environmental concern." A related request urged that a specific finding and public record be established documenting a decision to use a less than optimum routing from the environmental viewpoint.

Response: As previously stated, this proposed rulemaking involves only a general procedure for obtaining rights-of-way. The process used on all rights-of-way is prescribed under NEPA, which includes all aspects of environmental legislation. Severe restrictions and Legislative or Executive mandates make specific reference in this rulemaking unnecessary. For the Bureau of Land Mangement, the land report on every right-of-way will document the reasons for selecting a given route or location pursuant to section 505(b)(ii) of the Federal Land Policy and Management Act.

Comment: A few comments suggested that easements or short-term temporary permits be the only instruments granted.

Response: Instead of defining the specific types of instruments of conveyance contained in the definition of right-of-way under the Federal Land Policy and Management Act, the proposed rulemaking defines right-of-way as a generic term, the underlying purpose being that a right-of-way can be easily tailored to meet any individual right-of-way situation. Temporary use permits are also defined in the proposed rulemaking. These permits will have a limited term and will be issued only when necessary to facilitate the applicant's or holder's completion of his application or compliance with the terms and conditions of the right-of-way grant.

Comment: Several parties expressed concern that exclusive use and control of rights-of-way may be necessary under circumstances when the nature of the right-of-way or a related use poses a threat to public safety or the addition of another right-of-way related use within the site may be technically incompatible.

Response: Both agencies recognize safety and other hazards associated with mixing industrial and recreational or other public use. They also recognize the technical incompatibility or added cost burdens associated with the proximate location of some uses.

Section 503 of the Federal Land Policy and Management Act states: "In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way, the utilization of rights-of-way or permits shall reserve to the Secretary concerned the right to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way granted pursuant to this Act."

The Secretaries are directed to take into consideration ". . . National and State land use policies, environmental quality, economic efficiency, national security, safety and good engineering and technological practices," in designating and confining rights-of-way to corridors.

It is clear that rights-of-way are to be granted and managed on a basis that provides only such exclusivity as is truly necessary for the proposed use and is compatible with multiple use management and the public health and safety. Unsafe and untenable combinations will not be required. Further, common use of permit areas will be granted only after consultation with all parties involved.

Section 503 further requires the utilization of corridors where practical, and mandates that the Secretary issue regulations containing criteria and procedures for designating corridors. Criteria and procedures are incorporated in this proposed rulemaking. Designating corridors is a new area and will require extensive land use planning and coordination with other Federal agencies, State and local governments, private land owners and other interested groups.

Comment: Many comments urged that right-of-way grants be freely transferable by the holder without agency review or approval.

Response: These comments seem to ask for grants of fee simple in the public lands. This was not the intent of the Federal Land Policy and Management Act. The Senate Report for the Act states that management of national resource lands is to include the techniques of the issuance of permits, licenses, leases and other appropriate instruments to allow uses of land. It goes on to state, "The Secretary could not, however, convey out of Federal ownership any land or interest in land under this authorization." It is clear that management responsibility and authority is to remain with the Government.

Right-of-way grants authorize specified rights and privileges to named individuals or entities. At the same time, they require certain responsibilities be assumed by the holder. Transfer of privileges and responsibilities must be controlled in order to maintain a viable contractual relationship between the user and the agency. In addition, the Federal Land Policy and Management Act requires certain qualifications and disclosures from applicants. The Bureau of Land Management has the responsibility to determine a transferee's qualifications prior to transferring a right-of-way to that party. A right-of-way granted on public lands is a privilege, not an absolute right. The proposed rulemaking provides for the assignment of any grant or permit provided that the assignment has been approved by the authorized officer.

Comment: Several comments urged that grants be renewed, revised and assigned subject only to the initial terms and conditions.

Response: As discussed previously, the legislative history of the Federal Land Policy and Management Act acknowledges the possible need for very long term grants but indicates that such grants should provide for revision of terms and conditions to reflect changing times.

Title II gives guidance in land use planning and provides that management decisions shall remain subject to reconsideration, modification and termination through revision of the land use plan involved. Land use authorizations need to be made in a manner that will retain reasonable opportunities to adjust to new perceptions of the public interest.

An application to change the use authorized or the right-of-way site is a recognition by the holder of the need for revision. It opens the contractual relationship for appropriate revisions in the interest of both the holder and the Government.

The proposed rulemaking provides for modification at time of amendment. The need to update terms and conditions and the specific changes will be explained prior to transfer, thus reducing unexpected impacts on new owners.

Upon renewal, terms and conditions will also be reviewed and may be modified when appropriate. In addition, very long term grants will provide for modification in the public interest at specified times, generally keyed to the revision of land management plans.

An alternative would be to issue only short term grants due to inability to predict future contingencies. We believe that the maximum latitude should be given a holder by allowing the authorized officer, through the terms and conditions required in the regulations, to periodically review the provisions in a grant to determine if provisions need modification. Modifications may not be required in many circumstances and the review may serve to keep present provisions unchanged. However, changing circumstances involving, for example, public interest, safety or changing needs may require revising, modifying or deleting certain provisions or the entire grant. The holder's interests and contractual expectations will always be protected unless countervailing circumstances in the public interest should outweigh the individual interests. Appeal procedures are available to protect the holder's rights.

Comment: Most comments objected to bonding to assure compliance with terms and conditions. Many requested that regulated utilities and major companies be exempted from bonding.

Response: The Bureau of Land Management has had the authority to require bonding in the past and has used it with discretion. Bonding guarantees that money to repair damages is available, if necessary. It also deters willful non-compliance. Bonding, however, will be used only when the potential for damage is significant. The Federal Land Policy and Management Act's requirement that a right-of-way will not be issued until the authorized officer is satisfied that the holder is technically and financially capable, should reduce dependence on bonding.

Comment: The comments made about land rental fees were often contradictory. A few comments suggested fees should be based upon fair market value appraisal of the highest and best use of the land, others said not to use highest and best use. Still others asked, "fair market value of what?" Several requested a single lifetime payment, a few suggested five year payments, and others agreed with annual payments. Some comments urged individual appraisals, while others said "keep it simple" or use standard predetermined rates, and a few demanded that everybody pay the same rates. Several other comments recommended that fees not be adjusted with market changes, and one urged that the holder be required to manage the land for wildlife production in lieu of fees.

Response: In title I of the Federal Land Policy and Management Act, Congress declared that it is the policy of the United States that, ". . . (9) the

United States receive *fair market value of the use* of the public lands and their resources unless otherwise provided for by statute." (emphasis added) The Act reflects the fee principles stated in the Natural Resources User Charges Study transmitted to agencies by the former Bureau of the Budget in 1964. It states in part: "Many Federal Government programs furnish specific, identifiable benefits to the individuals and businesses using them. Equity to all taxpayers demands that those who enjoy the benefits should bear a greater share of the costs.

"Where Federally owned resources or property are leased or sold, a fair market value should be obtained. Charges are to be determined by the application of sound business management principles and so far as practicable and feasible in accordance with comparable practices.

"The Federal Government should recover the fair market value for the use of Federal land resources. Competitive bidding will be used to establish the fair market value on all instances where an identifiable competitive interest exists. Where a competitive interest does not exist, fees should be comparable to those charged for the use of similar private lands. Fees and charges for longterm use should be established in such a manner as will allow periodic timely adjustment."

Following these principles, fees will be determined by using acceptable land appraisal techniques and will represent the fair market value of the benefits received by the holder. Appraisal techniques acceptable to the appraisal industry will be used. The Bureau of Land Management and the Forest Service will coordinate techniques and results for consistency, as appropriate. Predetermined rates developed on a local or regional basis through comparison to appraised cases will be used under circumstances that do not warrant the expense of individual appraisal. In accordance with the Federal Land Policy and Management Act, annual fees will be charged except where the annual rental is less that $100. In such cases, 5-year payments will be required. Fees will be adjusted when necessary to reflect current fair market value.

Comment: Many comments requested that the regulations establish unequivocal free use for particular kinds of use (telephones, industries) and types of organizations (REA cooperatives and governmental bodies). Others urged that all users pay the same rates.

Response: The Federal Land Policy and Management Act provides discretionary authority to waive rental fees where a right-of-way is granted in reciprocation for a right-of-way conveyed to the United States in connection with a cooperative cost-share program.

It also provides discretionary authority to charge less than fair market value, including free use, to certain governmental and non-profit entities or where a valuable benefit is provided to the public or the programs of the agency without or at reduced charges. The House Report indicated the committee considered and supported long time agency policy of providing special price considerations favoring State and local governments and non-profit organizations. The Senate Report states "... it is not the intent of this committee to allow use of ... land without charge except where the holder is the Federal Government itself. ..."

Failure to charge fair market value provides a subsidy by all the public. It follows that free or lesser charges should be used only in those circumstances where all the public benefits from the use. Non-profit entities that are essentially tax or donation supported and which are engaged in a public or semi-public activity designed for the public health, safety or welfare will qualify for lesser charges. As a matter of equity, we believe it is inappropriate to charge lesser fees or grant free use when the holder is engaged in similar business and follows practices comparable to private commercial enterprise. For this reason, REA cooperatives and municipal utilities whose principle source of revenue is customer charges will, hereafter, be charged fair market value fees. In view of wide variations in organization, purpose and manner of doing business, it is impractical to attempt to interpret in the regulations each and every circumstance that may or may not qualify for fee reductions. Fair and equitable application will rest with the authorized officer. Uniformity will be achieved through Manual guidance and training. Decisions on charges are appealable.

Comment: There was practically unanimous objection to various aspects of cost reimbursement. Several comments said that the public should pay the cost of environmental studies because the public, not the applicant, benefits. Users asked to be exempt because their use was in the public interest through furnishing needed services to customers. Most felt that the nonrefundable fee schedules were too high and inequitable. Most wanted itemized expenditures and provisions for audit of agency records when actual costs rather than fee schedules are used. Several pointed out that private land owners would reciprocate and charge for costs when granting rights-of-way to the government. Several also wanted cost recovery waived when rental fees were waived, mandatory refund of excess payments, and return of payments if the application was denied.

Response: The Bureau of Land Management initiated cost reimbursement for all non-governmental rights-of-way in 1975 on existing authorities. In 1976, the Federal Land Policy and Management Act gave the Bureau and the Forest Service discretionary authority to recover "reasonable" costs. The Secretary of the Interior affirmed that costs of special studies and environmental reports were reasonable in Secretarial Order 3011 (42 FR 55280 (October 14, 1977)).

This issue was litigated twice, once under the statutory authority prior to the Federal Land Policy and Management Act, and most recently under the Act. In both cases, the Federal District Courts ruled that special studies and environmental reports were public benefits and should not be charged to an applicant. The ruling on the Act is under appeal. Pending the outcome of the appeal, no substantive change in position can be made.

The proposed rulemaking adopts the existing Bureau of Land Management cost reimbursement provisions (43 CFR 2802, except that the provision allowing bonds to cover reimbursement costs has been deleted. This is necessary because the 1978 appropriation act for the Bureau sets up a special account (authorized by the Act). At this time, the Bureau's funds for processing rights-of-way come from the special account and the sole source of funds is advance payment by applicants. The language and legislative history of the Oil and Gas Pipeline Act of 1973, the Federal Land Policy and Management Act of 1976, and the 1977 and 1978 Bureau of Land Management Appropriation Acts lead us to believe that our position is correct. By using cost reimbursement, processing major projects can be initiated quickly without waiting for the regular appropriation cycle. This can avoid up to 18 months delay in commencing application processing.

The proposed rulemaking also retains the present exemptions for cost reimbursement for: (1) State and local governments or their agencies and instrumentalities where the lands will be used for governmental purposes; (2) road use agreements or reciprocal road agreements; and (3) Federal agencies.

Situations exist where Federal agencies and private owners exchange

rights through road use and reciprocal road agreements. These are exempt from cost reimbursement. When the United States acquires a right-of-way, the costs of environmental reports, special studies and processing are borne by the Bureau of Land Management rather than the land owner.

Fees less than fair market value are granted in recognition of public services or benefits provided, including non-profit status organizations and corporations, but agency costs continue. Therefore, the proposed rulemaking did not adopt the nonreimbursement suggestion. Most applicants who qualify for free rental will be excluded from cost reimbursement.

Problems associated with returning excess payments center on the amount, not whether or not the Government must return overpayments. Mandatory language is unnecessary.

Recent experience indicates that the current minimum schedule of fees does not return all processing costs. Therefore, opportunities for lower fees are unlikely.

Costs incurred up to the point of denial of the application must be borne by the applicant. Denial has no effect on costs. By recording actual costs rather than fee schedules, the applicant has the right to obtain records kept by the Bureau of Land Management of actual processing costs, including personnel time, printing costs and surveying costs, all of which may be audited.

Comment: Many comments expressed opposition to imposing strict liability upon users and urged low limits of liability if adopted. Under this requirement, the holder is required to pay damages caused by his use whether or not the injuries and damages resulted from the holder's or third party actions or negligence.

Response: We believe it is appropriate that those who conduct extremely hazardous activities on public lands assume the risk of loss for injuries or damages caused to such public lands, natural resources, wildlife, other Federal lands, or innocent third parties whose property is destroyed as a direct result of the holder's extremely hazardous activities. Such holder shall also have the burden of performing immediate corrective actions; for example, replanting trees on public lands destroyed by fire.

Although strict liability may appear stringent at first glance, it serves to encourage preventative action and prompt attention to malfunctions. Certain extremely hazardous activities and uses have great destructive potential, e.g., forest fires, oil spills or radioactivity. Prompt preventative measures must therefore be taken to avoid massive destruction and loss of life and property. Placing the burden of risk or loss on the holder is an equitable measure recognized in commercial transactions, because, as between the holder, who is performing extremely hazardous activities, and an innocent third party land owner having property adjacent to the right-of-way, it is only reasonable that the person causing a hazardous or potentially hazardous activity control such activity or insure himself against potential hazards which he cannot control. Sometimes, however, such areas can be avoided or treated and risks can often be abated through undergrounding, insulating, improved system design and innovative clearing practices.

Liability provisions as drafted in these proposed regulations shall be imposed only in those cases where foreseeable hazards and risks are present, following the language in the Mineral Leasing Act of 1920, as amended by Pub. L. 93–153, title I (1973), after which title V of the Federal Land Policy and Management Act was modeled, and a strict liability ceiling of $1,000,000.00 was established. The holder is relieved of strict liability where damages or injuries result from acts of war or negligence of the United States.

Comment: Comments about the termination and suspension provisions in the proposed regulations varied widely. A few comments indicated fears of unreasonable acts by the administering officers. One comment suggested that action should be taken only for repeated violations, and another suggested action be taken only for willful and reckless misconduct.

Response: In accordance with the Federal Land Policy and Management Act, failure to construct, non-use or abandonment and failure to comply with terms and conditions of the grant and regulations are sufficient grounds for termination. The proposed rulemaking provides for written notice of the grounds for action and reasonable time to cure any non-compliance. The holder of a right-of-way may appeal any final decision which terminates the holder's right-of-way grant.

When the authorized officer finds a condition which must be immediately enjoined to protect the public health or safety or the environment, an immediate temporary suspension will be issued. Prompt on-the-ground review by a superior officer is provided in the case of immediate suspensions.

Comment: Several comments asked that if a right-of-way was to be terminated, sufficient time be granted to allow for budgeting of costs. A few asked that projects be terminated only when a reasonable alternative route was available.

Response: The proposed rulemaking provides for early notification. Normally the authorized officer will work with the holder to identify acceptable alternatives, but the Bureau of Land Management cannot bind itself to do this in all cases. Just as in the past, the Bureau does not expect a large number of terminations. Good locations based on inventories and land use planning will reduce the need for terminating rights-of-way.

Comment: Many comments objected to obtaining approval from the Bureau of Land Management prior to modifying facilities within an authorized right-of-way. Some opposition was based on interpreting the language in the Outline of Proposed Procedures to require approval of every activity including internal changes (changing electronic equipment within communication vaults), replacing broken insulators, etc. Several asked that upgrading capacity and phased reinforcement of facilities be allowed without advance approval.

Response: The proposed rulemaking is designed to accommodate normal maintenance without advance approval. Planned expansion, phased construction or reinforcement of authorized facilities can be included in the original application processing and authorized in the grant. When the grant is designed to accommodate changes, the contact and plan provision discussed below will involve minimal effort.

The language indicates that amended applications will be required when changes involve additional land or when the grant does not authorize the proposed use. The proposed rulemaking requires contact with the office administering the land and the joint development of contingency plans when activities or changes will impact the resources or visual characteristics or make previous analyses invalid. Contact and plans are also required for changes that might adversely affect other uses or the public. Contingency plans provide for appropriate protection and rehabilitation plans and additional environmental analysis, if needed.

Comment: Several comments opposed burdening counties and States with expensive surveys or map preparation costs in order to record existing public roads constructed under authority of R.S. 2477.

Response: The proposed rulemaking sets very minimum standards for maps. In most instances, existing highway or road maps will meet these requirements. Accuracy will be in keeping with the purpose which is to clarify road

ownership. Notation of the records affords protection to holders of these rights-of-way from third party interference and protects the holder's interest should ownership of the lands change.

It is hereby determined that the publication of this document is not a major Federal action significantly affecting the quality of the human environment and that no detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is required.

The Department of the Interior has determined that this document is not a significant regulatory action requiring the preparation of a regulatory analysis under Executive Order 12044 or 43 CFR Part 14.

Under the authority of title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761–1771), it is proposed to revise Group 2800, Subchapter B, Chapter II, Title 43 of the Code of Federal Regulations as set forth below:

1. Part 2800 is revised to read as follows:

Group 2800—Use; Rights-of-Way

PART 2800—RIGHTS-OF-WAY, PRINCIPLES AND PROCEDURES

Subpart 2800—Rights-of-Way; General

Subpart 2800—Rights-of-Way: General

§ 2800.0–1 Purpose.

The purpose of the regulations in this part is to establish procedures for the orderly and timely processing of applications, grants, permits, amendments, assignments and terminations for rights-of-way and permits over, upon, under or through public lands pursuant to title V, Federal Land Policy and Mangement Act of 1976 (43 U.S.C. 1761–1771).

§ 2800.0–2 Objectives.

It is the objective of the Secretary of the Interior to grant rights-of-way and temporary use permits, covered by the regulations in this part, to any qualified individual, business entity, or governmental entity and to regulate, control and direct the use of said rights-of-way on public land so as to:

(a) Protect the natural resources associated with the public lands and adjacent private or other lands administered by a government agency.

(b) Prevent unnecessary or undue environmental damage to the lands and resources.

(c) Promote the utilization of rights-of-way in common with respect to engineering and technological compatibility, national security and land use plans.

(d) Coordinate, to the fullest extent possible, all actions taken pursuant to this part with State and local governments, interested individuals and appropriate quasi-public entities.

§ 2800.0–3 Authority.

The regulations for this subpart are issued under title V of the Federal Land Policy and Management Act of 1976.

§ 2800.0–5 Definitions.

As used in this part, the term:

(a) "Act" means the Federal Land Policy and Management Act of October 21, 1976 (43 U.S.C. 1701 et seq.).

(b) "Secretary" means the Secretary of the Interior.

(c) "Authorized officer" means any employee of the Bureau of Land Management to whom has been delegated the authority to perform the duties described in this part.

(d) "Public lands" means any lands or interest in land owned by the United States and administered by the Secretary through the Bureau of Land Management, without regard to how the United States acquired ownership, except: (1) lands located on the Outer Continental Shelf; and (2) lands held for the benefit of Indians, Aleuts and Eskimos.

(e) "Applicant" means any qualified individual, partnership, corporation, association or other business entity, and any Federal, State or local governmental entity including municipal corporations which applies for a right-of-way grant or a temporary use permit.

(f) "Holder" means any applicant who has received a right-of-way grant or temporary use permit.

(g) "Right-of-way" means the public lands authorized to be used or occupied pursuant to a right-of-way grant.

(h) "Right-of-way grant" means an instrument issued pursuant to title V of the act authorizing the use of a right-of-way over, upon, under or through public lands for construction, operation, maintenance and termination of a project.

(i) "Temporary use permit" means a revocable non-possessory, non-exclusive privilege, authorizing temporary use of public lands in connection with construction, operation, maintenance, or termination of a project.

(j) "Facilities" means improvements constructed or to be constructed or used within a right-of-way pursuant to a right-of-way grant.

(k) "Project" means the transportation or other system for which the right-of-way is authorized.

(l) "Right-of-way corridor" means a parcel of land either linear or areal in character that has been identified by law, Secretarial Order, through the land use planning process or other management decision process as being suitable to accommodate more than one type of right-of-way or one or more rights-of-way which are similar, identical, or compatible.

§ 2800.0-7 Scope.

This part sets forth regulations governing:

(a) Issuing, amending or renewing right-of-way grants for necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way over, upon, under or through public lands, including but not limited to:

(1) Reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels and other facilities and systems for the impoundment, storage, transportation or distribution of water;

(2) Pipelines and other systems for the transportation or distribution of liquids and gases, other than water and other than oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom, and for storage and terminal facilities in connection therewith;

(3) Pipelines, slurry and emulsion systems, and conveyor belts for transportation and distribution of solid materials, and facilities for the storage of such materials in connection therewith;

(4) Systems for generation, transmission and distribution of electric energy, except that the applicant shall also comply with all applicable requirements of the Federal Energy Regulatory Commission under the Federal Power Act of 1935 (16 U.S.C. 791);

(5) Systems for transmission or reception of radio, television, telephone, telegraph and other electronic signals, and other means of communication;

(6) Roads, trails, highways, railroads, canals, tunnels, tramways, airways, livestock driveways or other means of transportation except where such facilities are constructed and maintained in connection with commercial recreation facilities on lands in the National Forest System;

(7) Such other necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way over, upon, under or through such lands; or

(8) Rights-of-way to any Federal department or agency for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any product produced therefrom.

(b) Temporary use of additional public lands for such purposes as the Secretary determines to be reasonably necessary for construction, operation, maintenance or termination of rights-of-way, or for access to the project or a portion of the project.

(c) However, the regulations contained in this part do not cover right-of-way grants for: Federal Aid Highways, roads constructed or used pursuant to cost share or reciprocal road use agreements, wilderness areas, and oil, gas and petroleum products pipelines except as provided for in § 2800.0-3(a)(8) of this title.

Subpart 2801—Terms and Conditions of Rights-of-Way Grants and Temporary Use Permits

§ 2801.1 Nature of interest.

§ 2801.1-1 Nature of right-of-way interest.

(a) All rights in public lands subject to a right-of-way grant or temporary use permit not expressly granted are retained and may be exercised by the United States. These rights include, but are not limited to:

(1) A continuing right of physical entry on and into any part of any facility within the right-of-way or permit area; and

(2) The right to require common use of the right-of-way, and the right to authorize use of the right-of-way for compatible uses (including the subsurface and air space).

(b) A right-of-way or temporary use permit may be used only for the purposes specified in the authorization. The holder may allow others to use the land as his/her agent in exercising the rights granted.

(c) All right-of-way grants and temporary use permits shall be issued subject to valid existing rights.

(d) A right-of-way grant or temporary use permit shall not give or authorize the holder to take from the public lands any mineral or vegetative material, including timber, without securing authorization under the Materials Act (30 U.S.C. 601 et seq.), and paying in advance the fair market value of the material cut, removed, used, or destroyed. However, common varieties of stone and soil necessarily removed in the construction of a project may be used elsewhere along the same right-of-way or permit area in the construction of the project without additional authorization and payment. At his discretion and when it is in the public interest, the authorized officer may in lieu of requiring an advance payment for any mineral or vegetative materials, including timber, cut or excavated, require the holder to stockpile or stack the material as designated locations for later disposal by the United States.

(e) A holder of a right-of-way grant or temporary use permit may assign a grant or permit to another, provided the holder obtains the written approval of the authorized officer.

(f) Notwithstanding the provisions of paragraph (b) of this section, the holder of a right-of-way grant may sublease a facility constructed, except for roads, on the right-of-way with the prior written consent of the authorized officer. In any subleasing arrangement, the holder shall continue to be responsible for compliance with all conditions of the grant.

(g) Each right-of-way grant or temporary use permit shall describe the public lands to be used or occupied and the grant or permit shall be limited to those lands which the authorized officer determines:

(1) Will be occupied by the facilities authorized;

(2) To be necessary for the construction, operation, maintenance, and termination of the authorized facilities;

(3) To be necessary to protect the public health and safety; and

(4) Will do no unnecessary damage to the environment.

(h) Each grant or permit shall specify its term. The term of the grant shall be limited to a reasonable period. A reasonable period for a right-of-way grant may range from a month to a year or a term of years to perpetuity. The term for a temporary use shall not exceed 3 years. In determining the period for any specific grant or permit, the authorized officer shall limit the term to no longer than is necessary to accomplish the purpose of the authorization. Factors to be considered by the authorized officer for the purpose of establishing an equitable term pertaining to the use include, but are not limited to:

(1) Land use plans and other management decisions;

(2) Public benefits provided;

(3) Cost and useful life of the facility;

(4) Project financing; and

(5) Any time limitations imposed by required licenses or permits that the holder must secure from other Federal or State agencies.

(i) Each grant issued for a term of 20 years or more shall contain a provision

requiring periodic review of the grant at regular intervals not to exceed 10 years.

(j) Each grant will have a provision stating whether it is renewable or not and if renewable, the terms and conditions applicable to the renewal.

(k) Each grant will not only comply with the regulations of this part, but also, comply with the provisions of any other applicable law and implementing regulations as appropriate.

§ 2801.1-2 Reciprocal grants.

When the authorized officer determines from an analysis of land use plans or other management decisions that a right-of-way for an access road is or shall be needed by the United States across lands directly or indirectly owned or controlled by an applicant for a right-of-way grant, he or she shall, if it is determined to be in the public interest, require the applicant, as a condition to receiving a right-of-way grant, to grant the United States a right-of-way that is adequate and similar in duration and rights.

§ 2801.2 Terms and conditions of interest granted.

(a) An applicant by accepting a right-of-way grant, temporary use permit, assignment, amendment or renewal agrees and consents to comply with and be bound by the following terms and conditions, excepting those which the Secretary may waive in a particular case:

(1) To the extent practicable, all State and Federal laws applicable to the authorized use and such additional State and Federal laws, along with the implementing regulations, that may be enacted and issued during the term of the grant or permit.

(2) That the right-of-way grant or temporary use permit be subject to the express covenant that it shall be modified, adapted or discontinued within the provisions of the act and without liability to the United States, if found by the Secretary that the use of the land for which the authorization was granted conflicts with any future proposed use or occupancy of the land when it is determined that the proposal will better serve the national interest.

(3) That in the construction, operation, maintenance and termination of the authorized use, there shall be no discrimination against any employee or applicant for employment because of race, creed, color, sex or national origin and all subcontracts shall include an identical provision.

(4) To build and repair roads, fences, and trails that may be destroyed or damaged by construction, operation or maintenance of the project and to build and maintain suitable crossings for roads and trails that intersect the project.

(5) To do everything reasonably within his or her power, both independently and upon request of the authorized officer, to prevent and suppress fires on or near the right-of-way or permit area. This includes making available such construction and maintenance forces as may be reasonably obtained for the suppression of fires.

(b) All right-of-way grants and temporary use permits issued, renewed, amended or assigned under these regulations shall contain such terms, conditions, and stipulations as may be required by the authorized officer regarding extent, duration, survey, location, construction, operation, maintenance, use and termination. The authorized officer shall impose stipulations which shall include, but shall not be limited to:

(1) Requirements for restoration, revegetation and curtailment of erosion of the surface of the land, or any other rehabilitation measure determined necessary;

(2) Requirements to ensure that activities in connection with the grant or permit shall not violate applicable air and water quality standards or related facility siting standards established by or pursuant to applicable Federal or State law;

(3) Requirements designed to control or prevent damage to scenic, esthetic and environmental values (including damage to fish and wildlife habitat), damage to public or private property and hazards to public health and safety;

(4) Requirements to protect the interests of individuals living in the general area who rely on the fish, wildlife and biotic resources of the area for subsistence purposes;

(5) Requirements to ensure that the facilities to be constructed, used and operated on the prescribed location are maintained and operated in a manner consistent with the grant or permit; and

(6) Requirements for compliance with State standards for public health and safety, environmental protection and siting, construction, operation and maintenance when those standards are more stringent than Federal standards.

§ 2801.3 Unauthorized occupancy.

Any occupancy or use of the public lands, other than casual use as set forth in § 2802.1(d) of this title, without authorization shall be considered a trespass and shall subject the trespasser to prosecution and liability for the trespass. Issuance of a right-of-way grant or temporary use permit to a trespasser shall be made in accordance with § 9239.0-9 of his title. This provision applies to all unauthorized use of the public lands and precludes the issuance of a right-of-way grant or temporary use permit until the trespass case has been settled. Once the trespass case has been settled, a new grant or permit may be made by the authorized officer in accordance with the procedures set forth in this part.

Subpart 2802—Applications

§ 2802.1 Preapplication activity.

(a) Anyone interested in obtaining a right-of-way grant or temporary use permit involving use of public lands is encouraged to establish early contact with the Bureau of Land Management office responsible for management of the affected public lands so that potential constraints may be identified, the proposal may be considered in land use plans, and processing of an application may be tentatively scheduled. The appropriate officer shall furnish the proponent with guidance and information about:

(1) Possible land use conflicts as identified by review of land management plans, land ownership records and other available information sources;

(2) Application procedures and probable time requirements;

(3) Applicant qualifications;

(4) Cost reimbursement requirements;

(5) Associated clearances, permits and licenses which may be required in addition to, but not in place of the grants or permits required under these regulations;

(6) Environmental and management considerations;

(7) Any other special conditions that can be identified;

(8) Identification of on-the-ground investigations which may be required in order to complete the application; and

(9) Coordination with Federal, State and local government agencies.

(b) Any information furnished by the proponent in connection with a pre-application activity or use which he/she requests not be disclosed, shall be protected to the extent consistent with the Freedom of Information Act (5 U.S.C. 552).

(c) No right-of-way applications processing work, other than that incurred in the processing of permits for temporary use of public lands in furtherance of the filing of an application and pre-application guidance under paragraph (a) of this section, shall be undertaken by the authorized officer prior to the filing of an

application together with advance payment as required by § 2803.1–1 of this title. Such processing work includes, but is not limited to, special studies such as environmental analyses, environmental statements, engineering surveys, resource inventories and detailed land use of record analyses.

(d) The prospective applicant is authorized to go upon the public lands to perform casual acts related to data collection necessary for the filing of an acceptable application. These casual acts or activities include, but are not limited to: (1) vehicle use on existing roads; (2) sampling; (3) marking of routes or sites; or (4) other activities that do not disturb the surface or require the removal of vegetation.

If, however, the authorized officer determines that appreciable surface or vegetative disturbance will occur or is a real possibility he shall issue a temporary use permit with appropriate terms, conditions, and special stipulations pursuant to § 2801.2 of this title.

(e) When, during pre-application discussions with the prospective applicant, the authorized officer supplies the prospective applicant with information set out in paragraph (a) of this section, the authorized officer shall also inform appropriate Federal, State and local government agencies that pre-application discussions have begun in order to assure that effective coordination between the prospective applicant and all responsible government agencies is initiated as soon as possible.

§ 2802.2 Application filing activity.

§ 2802.2–1 Application filing.

Applications for a right-of-way grant or temporary use permit shall be filed with the District Manager or the State Director having jurisidiction over the affected public lands except:

(a) Applications for Federal Aid Highways shall be filed pursuant to 23 U.S.C. 107, 317, as set out in 43 CFR 2821;

(b) Applications for cost-share roads shall be filed pursuant to 43 CFR 2812;

(3) Applications for oil and gas pipelines shall be filed pursuant to 43 CFR 2880; and

(4) Applications for projects on lands under the jurisdiction of 2 or more administrative units of the Bureau of Land Management may be filed at any of the Bureau of Land Management offices having jurisdiction over part of the project, and the applicant shall be notified where subsequent communications shall be directed.

§ 2802.2–2 Coordination of applications.

Applicants filing with any other Federal, State or local agency for a license, certificate of public convenience and necessity or any other authorization for a project involving a right-of-way on public lands, shall simultaneously file an application under this part with the Bureau of Land Management for a right-of-way grant. To minimize duplication, pertinent information from the application to such agency may be appended or referenced in the application for the right-of-way grant.

§ 2802.3 Application content.

§ 2802.3–1 Applicant qualifications and disclosure.

(a) An applicant for a right-of-way grant or temporary use permit must be a citizen of the United States, an association of such citizens, organized under the laws of the United States or of any State thereof, a corporation or other business entity organized or licensed under the laws of the United States or of any State thereof, a Federal agency, or a State or local government. Aliens may not acquire or hold any direct or indirect interest in right-of-way grants or temporary use permits except that they may own or control stock in corporations holding right-of-way grants or temporary use permits, if the laws of their country do not deny similar or like privileges to citizens of the United States. If any appreciable percentage of the stock of a corporation is held by aliens who are citizens of a country denying similar or like privileges to United States citizens, its application shall be denied. A right-of-way shall not be granted to a minor, but right-of-way may be granted to legal guardians or trustees of minors in their behalf.

(b) An application by a private corporation shall be accompanied by a copy of its charter or articles of incorporation, duly certified by the proper State official where the corporation was organized, and a copy of its bylaws, duly certified by the secretary of the corporation.

(c) A corporation, other than a private corporation, shall file a copy of the law under which it was formed and provide proof of organization under the same, and a copy of its bylaws, duly certified by the secretary of the corporation.

(d) When a corporation is doing business in a State other than that in which it is incorporated, it shall submit a certificate from the Secretary of State or other proper official of that State indicating that it has complied with the laws of the State governing foreign corporations to the extent required to entitle the company to operate in such State, and that the corporation is in good standing under the laws of that State.

(e) A copy of the resolution by the board of directors of the corporation or other documents authorizing the filing of the application shall also be filed.

(f) If the corporation has previously filed with the Department the papers required by this subpart, and there have not been any amendments or revisions of the corporation's charter, articles of incorporation or bylaws, the requirements of this subpart may be met in subsequent applications, by specific reference to the previous filing by date, place and case number.

(g) If the applicant is a partnership, association or other unincorporated entity, the application shall be accompanied by a certified copy of the articles of association, partnership agreement, or other similar document creating the entity, if any. The application shall be signed by each partner or member of the entity, unless the entity shows evidence in the form of a resolution or similar document that one member has been authorized to sign in behalf of the others. In the absence of such resolution each partner shall furnish the evidence of qualification which would be required if the partner or member were applying separately.

(h) If the applicant is a State or local government, or agency or instrumentality thereof, the application shall be accompanied by a statement to that effect and a copy of the law, resolution, order, or other authorization under which the application is made.

(i) Each application by a partnership, corporation, association or other business entity shall disclose the identity of the participants in the entity and shall include where applicable:

(1) The name, address and citizenship of each participant (partner, associate or other);

(2) Where the applicant is a corporation: the name, address, and citizenship of each shareholder owning 3 percent or more of each class of shares, together with the number and percentage of any class of voting shares of the entity which each shareholder is authorized to vote; and

(3) The name, address, and citizenship of each affilitate of the entity. Where an affiliate is contolled by the entity, the application shall disclose the number of shares and the percentage of each class of voting stock of that affiliate owned, directly or indirectly, by the entity. If an affiliate controls the entity, the number of shares and the percentage of each class of voting stock of the entity owned, directly or indirectly, by the affiliate shall be included.

§ 2802.3-2 Technical and financial capability.

The applicant shall furnish evidence satisfactory to the authorized officer that the applicant has, or prior to commencement of construction shall have, the technical and financial capability to construct, operate, maintain and terminate the project for which authorization is requested.

§ 2802.3-3 Project description.

(a) The applicant shall furnish an explanation of how the project will interrelate with existing and future projects and other developments on the public lands.

(b) The project descripton shall be in sufficient detail to enable the authorized officer to determine:

(1) The technical and economic feasibility of the project;

(2) Its impact on the environment;

(3) Any benefits provided to the public;

(4) The safety of the proposal; and

(5) The specific public lands proposed to be occupied or used.

When required by the authorized officer, applicant shall also submit the following:

(i) A description of the proposed facility;

(ii) An estimated schedule for construction of all facilities together with anticipated manpower requirements for each stage of construction;

(iii) A description of the construction techniques to be used;

(iv) Total estimated construction costs; and

(v) A description of the applicant's alternative route considerations.

§ 2802.3-4 Environmental protection plan.

If the authorized officer determines that the issuance of the right-of-way authorization requires the preparation of an environmental statement, the applicant shall submit a plan for the protection and rehabilitation of the environment during construction, operation, maintenance and termination of the project.

§ 2802.3-5 Additional information.

The applicant shall furnish any other information and data required by the authorized officer to enable him/her to make a decision on the application.

§ 2802.3-6 Maps.

(a) The authorized officer may at his/her discretion require the applicant to file a map with the application. When the authorized officer determines not to require the filing of a map with the application, the application may be filed and processing may proceed. Where the application is accepted without a map, the applicant shall be notified that a map shall be required prior to the issuance of the grant or permit, or within 60 days of completion of construction, as determined by the authorized officer. When the authorization is for use of an existing road controlled by the United States, any map showing said road shall suffice. The requirements of paragraph (b) of this section shall not apply in this situation.

(b) Maps portraying linear rights-of-way, as a minimum, shall show the following data:

(1) The bearing and distance of the traverse line or the true centerline of the facility as constructed;

(2) At least one tie to a public land survey monument to either the beginning or ending point of the right-of-way. If a public land survey monument is not within a reasonable distance as determined by the authorized officer, the survey shall be tied to either a relatively permanent man-made structure or monument or some prominent natural feature. However, when the right-of-way crosses both public lands and lands other than public lands, each parcel of public land crossed by said right-of-way must be tied to a public land survey monument, or if the map shows a continuous survey from the beginning point to the ending point of the project regardless of land ownership, then only one corner tie at either the initial or terminal point is required;

(3) The exterior limits of the right-of-way and the width thereof;

(4) A north arrow;

(5) All subdivisions of each section or portion thereof crossed by the right-of-way, with the subdivisions, sections, townships, and ranges clearly and properly noted; and

(6) Scale of the map. The map scale shall be such that all of the required information shown thereon is legible.

(c) Maps portraying non-linear or site-type rights-of-way shall include the requirements of paragraph (b)(4), (5), and (6) of this section. In addition, the map shall show, as a minimum, the following data:

(1) The bearing and distance of each exterior sideline of the site; and

(2) At least one angle point of the survey shall be tied to a public land survey monument, as provided for in paragraph (b)(2) of this section.

(d) Any person, State or local government which has constructed public highways under authority of R.S. 2477 (43 U.S.C. 932, repealed October 12, 1976), shall file within 3 years of the effective date of these regulations a map showing the location of all such public highways constructed under R.S. 2477. Maps required pursuant to this paragraph shall, as a minimum, be a county highway map showing all county roads located on the public lands, a State highway map showing State highways located on public land, and in the case of a municipality, a street or road map showing the location of city streets or roads. An individual who has constructed a public road pursuant to R.S. 2477 shall, as a minimum, submit a United States Geological Survey Quadrangle showing the location of said road on public land.

§ 2802.4 Application processing.

(a) The authorized officer shall acknowledge, in writing, receipt of the application and initial cost reimbursement payment required by § 2803.1-1 of this title. An application may be denied if the authorized officer determines that:

(1) The proposed right-of-way or permit would be inconsistent with the purpose for which the public lands are managed;

(2) That the proposed right-of-way or permit would not be in the public interest;

(3) The applicant is not qualified;

(4) The right-of-way or permit would otherwise be inconsistent with the act or other applicable laws; or

(5) The applicant does not or cannot demonstrate that he/she has the technical or financial capacity.

(b) Upon receipt of the acknowledgement, the applicant may continue his or her occupancy of the public land pursuant to § 2802.1(d) of this title to continue to gather data necessary to perfect the application. However, if the applicant finds or the authorized officer determines that surface disturbing activities will occur in gathering the necessary data to perfect the application, the applicant shall file an application for a temporary use permit prior to entering into such activities on the public land.

(c) The authorized officer may require the applicant for a right-of-way grant to submit such additional information as he deems necessary for review of the application. Where the authorized officer determines that the information supplied by the applicant is incomplete or does not conform to the act or these regulations, the authorized officer shall either reject the application or notify the applicant of the continuing deficiency and afford the applicant an opportunity to file a correction. Where a deficiency notice has not been adequately complied with, the authorized officer may reject the application or notify the applicant of the continuing deficiency

and afford the applicant an opportunity to file a correction.

(d) Prior to issuing a right-of-way grant or temporary use permit, the authorized officer shall:

(1) Complete an environmental analysis in accordance with the National Environmental Policy Act of 1969;

(2) Determine the compliance of the applicant's proposed plans with applicable Federal and State laws;

(3) Consult with all other Federal, State, and local agencies having an interest, as appropriate; and

(4) Take any other action necessary to fully evaluate and make a decision to approve or deny the application and prescribe suitable terms and conditions for the grant or permit.

(e) The authorized officer may hold public meetings on an application for a right-of-way grant or temporary use permit if he determines that such meetings are appropriate and that sufficient public interest exists to warrant the time and expense of such meetings. Notice of public meetings shall be published in the Federal Register or in local newspapers or in both.

(f) A right-of-way grant or temporary use permit need not conform to the applicant's proposal, but may contain such modifications, terms, stipulations or conditions, including changes in route or site location on public lands, as the authorized officer determines to be appropriate.

(g) No right-of-way grant or temporary use permit shall be in effect until the applicant has accepted, in writing, the terms and conditions of the grant or permit. Written acceptance shall constitute an agreement between the applicant and the United States that, in consideration of the right to use public lands, the applicant shall comply with all terms and conditions contained in the authorization and the provisions of applicable laws and regulations.

(h) The authorized officer may place a provision in a right-of-way grant requiring that no construction on or use of the right-of-way shall occur until detailed construction or use plans have been submitted to the authorized officer for approval and one or more notices to proceed with that construction or use have been issued by the authorized officer. This requirement may be imposed for all or any part of the right-of-way.

§ 2802.5 Special application procedures.

An applicant filing for a right-of-way within 4 years from the effective date of this subpart for an unauthorized electric power or telephone line that existed on public land prior to October 21, 1976, is not:

(a) Required to reimburse the United States for costs incurred for processing an application and for the preparation of reports and statements pursuant to the National Environmental Policy Act of 1969 (see § 2803.1–1(a)(1)) which are above the schedule shown in § 2803.1–1(a)(3)(i) of this title.

(b) Required to reimburse the United States for costs incurred incident to a right-of-way for monitoring (the construction, operation, maintenance and termination) of authorized facilities as required in § 2803.1–1(b) of this title.

(c) Required to pay rental fees for the period of unauthorized land use.

Subpart 2803—Administration of Rights Granted

§ 2803.1 General requirements.

§ 2803.1–1 Reimbursement of costs.

(a)(1) An applicant for a right-of-way grant or a temporary use permit shall reimburse the United States for administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347), before the right-of-way grant or temporary use permit shall be issued under the regulations of this title.

(2) The regulations contained in this subpart do not apply to:

(i) State or local governments or agencies or instrumentalities thereof where the public lands shall be used for governmental purposes and such lands and resources shall continue to serve the general public, except as to right-of-way grants or temporary use permits issued under section 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 180);

(ii) Road use agreements or reciprocal road agreements; or

(iii) Federal agencies.

(3) An applicant shall submit with each application a nonreturnable payment in accordance with the following schedule:

(i) Each right-of-way grant or temporary use permit for crossing public lands (e.g., for powerlines, pipelines, roads and other linear uses).

Length	Payments
Less than 5 miles	$50 per mile or fraction thereof.
5 to 20 miles	$500.
20 miles and over	$500 for each 20 miles or fraction thereof.

(ii) Each right-of-way grant or temporary use permit for non-linear uses (e.g. for communication sites, reservoir sites, plant sites, and camp sites)—$250 for each 40 acres or fraction thereof.

(4) When an application is received, the authorized officer shall estimate the costs expected to be incurred by the United States in processing the application. If, in the judgment of the authorized officer, such costs will exceed the payment required by paragraph (a)(3) of this section by an amount which is greater than the cost of maintaining actual cost records for the application review process, the authorized officer shall require the applicant to make periodic payments of the estimated reimbursable costs prior to the incurrence of such costs by the United States. Such payments may be refunded or adjusted as provided by paragraph (a)(8) of this section.

(5) Prior to the issuance of a right-of-way grant or temporary use permit, the applicant shal be required to pay additional amounts to the extent the costs of the United States have exceeded the payments required by paragraphs (a)(3) and (4) of this section.

(6) An applicant whose application is denied shall be responsible for administrative and other costs incurred by the United States in processing its application, and such amounts as have not been paid in accordance with paragraphs (a)(3) and (4) of this section shall be due within 30 days of receipt of notice from the authorized officer of the amount due.

(7) An applicant which withdraws its application before a decision is reached on said application is responsible for costs incurred by the United States in processing such application up to the date upon which the authorized officer receives written notice of the withdrawal, and for costs subsequently incurred by the United States in terminating the application review process. Reimbursement of such costs shall be due within 30 days of receipt of notice from the authorized officer of the amount due.

(8) If payment, as required by paragraphs (a)(4) and (b)(3) of this section, exceeds actual costs to the United States, refund may be made by the authorized officer from applicable funds under authority of 43 U.S.C. 1734, or the authorized officer may adjust the next billing to reflect the overpayment previously received. Neither an applicant nor a holder shall set off or otherwise deduct any debt due to or any sum claimed to be owed them by the United States without the prior written approval of the authorized officer.

(9) The authorized officer shall, on request, give an applicant or a prospective applicant an estimate,

based on the best available cost information, of the costs which would be incurred by the United States in processing an application. However, reimbursement shall not be limited to the estimate of the authorized officer if actual costs exceed the projected estimate.

(10) When 2 or more applications for right-of-way grants are filed which the authorized officer determines to be in competition with each other, each applicant shall reimburse the United States according to subparagraphs (3) through (7) of this section, except that those costs which are not readily identifiable with one of the applications, such as costs for portions of an environmental statement that relate to all of the proposals generally, shall be paid by each of the applicants in equal shares.

(11) When through partnership, joint venture or other business arrangement, more than one person, partnership, corporation, association or other entity apply together for a right-of-way grant or temporary use permit, each such applicant shall be jointly and severally liable for costs under § 2803.1–1 of this title.

(12) When 2 or more noncompeting applications for right-of-way grants are received for what, in the judgment of the authorized officer, is one right-of-way system, all the applicants shall be jointly and severally liable for costs under § 2803.1–1 of this title for the entire system; subject, however, to the provisions of subparagraph (11) of this paragraph.

(13) The regulations contained in § 2803.1–1 of this title are applicable to all applications for right-of-way grants or temporary use permits incident to rights-of-way over the public lands pending on June 1, 1975.

(b)(1) After issuance of a right-of-way grant or temporary use permit for which fees were assessed under paragraph (a) of this section, the holder thereof shall reimburse the United States for costs incurred by the United States in monitoring the construction, operation, maintenance and temination of authorized facilities on the right-of-way or permit area, and for protection and rehabilitation of the lands involved.

(2) Each holder of a right-of-way grant or temporary use permit shall submit within 60 days of the issuance thereof a nonreturnable payment in accordance with the following schedule:

(i) Each right-of-way grant or temporary use permit for crossing public lands (e.g., for powerlines, pipelines, roads, and other linear uses).

Length	Payment
Less than 5 miles	$20 per mile or fraction thereof.
5 to 20 miles	$200.
20 miles and over	$200 for each 20 miles or fraction thereof.

(ii) Each right-of-way grant or temporary use permit (e.g., for communication sites, reservoir sites, plant sites, and camp sites)—$100 for each 40 acres or fraction thereof.

(iii) If a project has the feature of subdivisions (i) and (ii) of this subparagraph in combination, the payment shall be the total of the amounts required by subdivisions (i) and (ii) of this subparagraph.

(3) When a right-of-way grant or temporary use permit is issued, the authorized officer shall estimate the costs, based on the best available cost information, expected to be incurred by the United States in monitoring holder activity. If such costs exceed the payment required by paragraph (b)(2) of this section by an amount which is greater than the costs of maintaining actual costs records for the monitoring process, the authorized officer shall require the holder to make periodic payments of the estimated reimbursable costs prior to the incurrence of such costs by the United States. Such payments may be refunded or adjusted as provided by paragraph (a)(8) of this section.

(4) Following termination of a right-of-way grant or temporary use permit, the former holder shall be required to pay additional amounts to the extent the actual costs incurred by the United States have exceeded the payments required by paragraphs (b) (2) and (3) of this section.

§ 2803.1–2 Rental fees.

(a) The holder of a right-of-way grant or temporary use permit, except as provided in paragraphs (b) and (c) of this section, or when waived by the Secretary, shall pay annually, in advance, the fair market rental value as determined by the authorized officer. Said fee shall be based upon the fair market value of the rights authorized in the right-of-way grant or temporary use permit, as determined by appraisal by the authorized officer, provided however, that where the annual fee is $100 or less, an advanced lump-sum payment for 5 years may be required. The 5-year lump-sum for use and occupancy of lands under these regulations shall not be less than $25.00.

(b) To expedite the processing of any grant or permit pursuant to this part, the authorized officer may establish an estimated rental fee and collect this fee in advance with the provision that upon receipt of an approved fair market value appraisal the advance rental fee shall be adjusted accordingly.

(c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:

(1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.

(2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.

(3) When a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary.

(4) Rental fees may be waived for rights-of-way involving cost share roads and reciprocal right-of-way agreements.

(5) In instances where the applicant holds an outstanding permit, lease, license or contract for which the United States is already receiving compensation, no rental fee shall be charged for the following:

(i) Where the applicant needs a right-of-way grant or temporary use permit within the exterior boundaries of the permit, lease, license or contract area; and

(ii) Where the applicant needs a right-of-way across public lands outside the permit, lease, license or contract area in order to reach said area.

(d) Rental fees may be initiated or adjusted whenever necessary to reflect current fair market value: (1) As a result of reappraisal of fair market values, or (2) as a result of a change in the holder's qualifications under paragraph (c) of this section. Reasonable notice shall be given prior to imposing or adjusting rental fees pursuant to this paragraph. Decisions on fees are subject to appeal pursuant to § 2804 of this title.

(e) If a charge required by this section is not paid when due, and such default shall continue for 30 days after notice, action may be taken to terminate the right-of-way grant. After default has occurred, no structures, buildings or other equipment may be removed from the servient lands except upon written permission from the authorized officer.

§ 2803.1–3 Bonding.

The authorized officer may require the holder of a right-of-way grant or temporary use permit to furnish a bond or other security satisfactory to him, to secure the obligations imposed by the

grant or permit and applicable laws and regulations.

§ 2803.1-4 Liability.

(a) Except as provided in paragraph (f) of this section, each holder shall be fully liable to the United States for any damage or injury incurred by the United States in connection with the use and occupancy of the right-of-way or permit area by the holder.

(b) Except as provided in paragraph (f) of this section, holders shall be held to a standard of strict liability for any activity or facility within a right-of-way or permit area which the authorized officer determines, in his discretion, presents a foreseeable hazard or risk of damage or injury to the United States. The activities and facilities to which such standards shall apply shall be specified in the right-of-way grant or temporary use permit. Strict liability shall not be imposed for damage or injury resulting primarily from an act of war or the negligence of the United States. To the extent consistent with other laws, strict liability shall extend to costs incurred by the United States for control and abatement of conditions, such as fire or oil spills, which threaten lives, property or the environment, regardless of whether the threat occurs on areas that are under Federal jurisdiction. Stipulations in right-of-way grants and temporary use permits imposing strict liability shall specify a maximum limitation on damages which, in the judgment of the authorized officer, is commensurate with the foreseeable risks or hazards presented. The maximum limitation shall not exceed $1,000,000 for any one event, and any liability in excess of such amount shall be determined by the ordinary rules of negligence of the jurisdiction in which the damage or injury occurred.

(c) In any case where strict liability is imposed and the damage or injury was caused by a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction in which the damage or injury occurred.

(d) Except as provided in paragraph (f) of this section, holders shall be fully liable for injuries or damages to third parties resulting from activities or facilities on lands under Federal jurisdiction in which the damage or injury occurred.

(e) Except as provided in paragraph (f) of this section, holders shall fully indemnify or hold harmless the United States for liability, damage or claims arising in connection with the holder's use and occupancy of rights-of-way or permit areas.

(f) If a holder is a State or local government, or agency or instrumentality thereof, it shall be liable to the fullest extent its laws allow at the time it is granted a right-of-way grant or temporary use permit. To the extent such a holder does not have the power to assume liability, it shall be required to repair damages or make restitution to the fullest extent of its powers at the time of any damage or injury.

(g) All owners of any interest in, and all affiliates or subsidiaries of any holder of a right-of-way grant or temporary use permit, except for corporate stockholders, shall be jointly and severally liable to the United States in the event that a claim cannot be satisfied by the holder.

(h) Except as otherwise expressly provided in this section, the provision in this section for a remedy is not intended to limit or exclude any other remedy.

(i) If the right-of-way grant or temporary use permit is issued to more than one holder, each shall be jointly and severally liable under this section.

§ 2803.2 Holder activity.

(a) If a notice to proceed requirement has been included in the grant or permit, the holder shall not initiate construction, occupancy or use until the authorized officer issues a notice to proceed.

(b) Any substantial deviation in location or authorized use by the holder during construction, operation or maintenance shall be made only with prior approval of the authorized officer under § 2803.6-1 of this title for the purposes of this paragraph, substantial deviation means:

(1) With respect to location, the holder has constructed the authorized facility outside the prescribed boundaries of the right-of-way authorized by the instant grant or permit.

(2) With respect to use, the holder has changed or modified the authorized use by adding equipment, overhead or underground lines, pipelines, structures or other facilities not authorized in the instant grant or permit.

(c) The holder shall notify the authorized officer of any change in status subsequent to the application or issuance of the right-of-way grant or temporary use permit. Such changes include, but are not limited to, legal mailing address, financial condition, business or corporate status. When requested by the authorized officer, the holder shall update and/or attest to the accuracy of any information previously submitted.

(d) If required by the terms of the right-of-way grant or temporary use permit, the holder shall, subsequent to construction and prior to commencing operations, submit to the authorized officer a certification of construction, verifying that the facility has been constructed and tested in accordance with terms of the right-of-way grant or temporary use permit, and in compliance with any required plans and specifications, and applicable Federal and State laws and regulations.

§ 2803.3 Immediate temporary suspension of activities.

(a) If the authorized officer determines that an immediate temporary suspension of activities within a right-of-way or permit area for violation of the terms and conditions of the right-of-way authorization is necessary to protect public health or safety or the environment, he may promptly abate such activities prior to an administrative proceeding.

(b) The authorized officer may give an immediate temporary suspension order orally or in writing at the site of the activity to the holder or a contractor or subcontractor of the holder, or to any representative, agent, employee or contractor of the holder, and the suspended activity shall cease at that time. As soon as practicable, the authorized officer shall confirm the order by a written notice to the holder addressed to the holder or the holder's designated agent.

(c) An order of immediate temporary suspension of activities shall remain effective until the authorized officer issues an order permitting resumption of activities.

(d) Any time after an order of immediate temporary suspension has been issued, the holder may file with the authorized officer a request for permission to resume. The request shall be in writing and shall contain a statement of the facts supporting the request.

(e) The authorized officer may render an order to either grant or deny the request to resume within 5 working days of the date the request is filed. If the authorized officer does not render an order on the request within 5 working days, the request shall be considered denied, and the holder shall have the same right to appeal the denial as if a final order denying the request had been issued by the authorized officer.

§ 2803.4 Suspension and termination of right-of-way authorizations.

(a) If the right-of-way grant or temporary use permit provides by its terms that it shall terminate on the occurrence of a fixed or agreed-upon condition, event, or time, the right-of-way authorization shall thereupon automatically terminate by operation of law, unless some other procedure is specified in the right-of-way grant or

temporary use permit. The authorized officer may terminate a right-of-way grant or temporary use permit when the holder request or consents to its termination in writing.

(b) The authorized officer may suspend or terminate a right-of-way grant or temporary use permit if he determines that the holder is unwilling, unable or has failed to comply with applicable laws or regulations, or any terms, conditions or stipulations of the right-of-way grant or temporary use permit or has abandoned the right-of-way.

(c) Failure of the holder of a right-of-way grant to use the right-of-way for the purpose for which the authorization was issued for any continuous five-year period shall constitute a presumption of abandonment. The holder may rebut the presumption by proving that his failure to use the right-of-way was due to circumstances not within the holder's control.

(d) Before suspending or terminating a right-of-way grant the authorized officer shall give the holder written notice that such action is contemplated and the grounds therefor and shall allow the holder a reasonable opportunity to cure such noncompliance.

§ 2803.4-1 Disposition of improvements upon terminations.

Within a reasonable time after termination, revocation or cancellation of a right-of-way grant, the holder shall remove such structures and improvements and shall restore the site to a condition satisfactory to the authorized officer. If the holder fails to remove all such structures or improvements within a reasonable period, as determined by the authorized officer, they shall become the property of the United States, but the holder shall remain liable for the cost of removal of the structures and improvements and for restoration of the site.

§ 2803.5 Change in Federal jurisdiction or disposal of lands.

(a) Where a right-of-way grant or temporary use permit administered under these regulations traverses public lands that are transferred to another Federal agency, administration of the right-of-way shall, at the discretion of the authorized officer, be assigned to the acquiring agency unless such assignment would diminish the rights of the holder.

(b) Where a right-of-way grant or temporary use permit traverses public lands that are transferred out of Federal ownership, the transfer of the land shall, at the discretion of the authorized officer, include an assignment of the right-of-way, be made subject to the right-of-way, or the United States may reserve unto itself the land encumbered by the right-of-way.

§ 2803.6 Amendments, assignments and renewals.

§ 2803.6-1 Amendments.

(a) Any substantial deviation in location or use as set forth in § 2803.2(b) shall require the holder of a grant or permit to file an amended application. The requirements for the amended application and the filing are the same and shall be accomplished in the manner as set forth in subpart 2802 of this title.

(b) Holders of right-of-way grants issued before October 21, 1976, who find it necessary or are directed by the authorized officer to amend their grants shall comply with paragraph (a) of this section in filing their applications. Upon acceptance of the amended application by the authorized officer an amended right-of-way grant shall be issued. To the fullest extent possible, and when in the public interest as determined from current land use plans and other management decisions, the amended grant shall contain the same terms and conditions set forth in the original grant with respect to annual rent, duration and nature of interest.

§ 2803.6-2 Amendments to existing railroad grants.

(a) An amended application required under § 2803.6-1(a) or (b), as appropriate, shall be filed with the authorized officer for any realignment of a railroad and appurtenant communication facilities which are required to be relocated due to the realignment. Upon acceptance of the amended application by the authorized officer, an amended right-of-way grant shall be issued within 6 months of date of acceptance of the application. The date of acceptance of the application for the purpose of this paragraph shall be determined in accordance with § 2802.4(a).

(b) Notwithstanding the regulations of this part, the authorized officer may include in the amended grant the same terms and conditions of the original grant with respect to the payment of annual rental, duration, and nature of interest if he/she finds them to be in the public interest and the lands involved are not within an incorporated community and are of approximately equal value.

§ 2803.6-3 Assignments.

Any proposed assignment in whole or in part of any right or interest in a right-of-way grant or temporary use permit acquired pursuant to the regulations of this part shall be filed in accordance with §§ 2802.1-1 and 2802.3 of this title. The application for assignment shall be accompanied by the same showing of qualifications of the assignee as if the assignee were filing an application for a right-of-way grant or temporary use permit under the regulations of this part. In addition, the assignment shall be supported by a stipulation that the assignee agrees to comply with and to be bound by the terms and conditions of the grant to be assigned plus any additional terms and conditions and any special stipulations that the authorized officer may impose. No assignment shall be recognized unless and until it is approved in writing by the authorized officer.

§ 2803.6-4 Reimbursement of cost for assignments.

All filings for assignments made pursuant to this section shall be accompanied by a nonrefundable payment of $50.00 from the assignor. Exceptions for a nonrefundable payment for an assignment are same as in § 2802.1 of this title.

§ 2803.6-5 Renewals of right-of-way grants and temporary use permits.

(a) When a grant provides that it may be renewed, the authorized officer shall renew the grant so long as the project or facility is still being used for purposes authorized in the original grant and is being operated and maintained in accordance with all the provisions of the grant and pursuant to the regulations of this title. Prior to renewing the grant, the authorized officer may modify the grant's terms, conditions, and special stipulations to reflect any new requirements imposed by current Federal and State land use plans, laws, regulations or other management decisions.

(b) When a grant does not contain a provision for renewal, the authorized officer, upon request from the holder and prior to the expiration of the grant, may renew the grant at his discretion. A renewal pursuant to this section shall comply with the same provisions contained in paragraph (a) of this section.

(c) Temporary use permits issued pursuant to the regulations of this part may be renewed at the discretion of the authorized officer. The holder of a permit desiring a renewal shall notify the authorized officer in writing of the need for renewal prior to its expiration date. Upon receipt of the notice, the authorized officer shall either renew the permit or reject the request.

(d) Renewals of grants and permits pursuant to paragraphs (a), (b) and (c) of this section are not subject to § 2803.1–1 of this title.

(e) Denial of any request for renewal by the authorized officer under paragraphs (b) and (c) of this section shall be final with no right of review or appeal.

Subpart 2804—Appeals.

§ 2804.1 Appeals procedure.

(a) All appeals under this part shall be taken under 43 CFR Part 4 from any final decision of the authorized officer to the Office of the Secretary, Board of Land Appeals.

(b) All decisions of the authorized officer under this part shall remain effective pending appeal unless the Secretary rules otherwise, and the provisions of 43 CFR 4.21(a) shall not apply to such decisions.

Subpart 2805—Applications for Electric Power Transmission Lines of 66 KV or Above

§ 2805.1 Application requirements.

(a) Each application for authority to construct, work and maintain a facility for the generation of electric power and energy or for the transmission or distribution of electric power and energy of 66 kilovolts or higher under this subpart shall be referred to the Secretary of the Department of Energy to determine the relationship of the proposed facility to the power-marketing program of the United States. Where the proposed facility does not conflict with the program of the United States, the authorized officer, upon notification to that effect, shall proceed to act upon the application. In the case of necessary changes respecting the proposed location, construction or utilization of the facility in order to eliminate conflicts with the power-marketing program of the United States, the authorized officer shall obtain from the applicant written consent to or compliance with such requirements before taking further action on the application: *Provided, however,* That if increased costs to the applicant result from changes to eliminate conflicts with the power-marketing program of the United States, and it is determined that a right-of-way should be granted, such changes will be required upon equitable contract arrangements covering costs and other appropriate factors.

(b) The applicant shall make provision, or bear the reasonable cost, as may be determined by the Secretary of the Department of Energy, of making provision for avoiding inductive or conductive interference between any transmission facility or other works constructed, operated or maintained by it on the right-of-way authorized under the grant and any radio installation, telephone line or other communication facilities existing when the right-of-way is authorized or any such installation, line or facility thereafter constructed or operated by the United States or any agency thereof. This provision shall not relieve the applicant from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating conductive interference.

(c) An applicant for a right-of-way for a transmission facility having a voltage of 66 kilovolts or more shall execute and file with its application a stipulation agreeing to accept the right-of-way grant subject to the following conditions:

(1) In the event the United States, pursuant to law, acquires the applicant's transmission or other facilities constructed on or across such right-of-way, the price to be paid by the United States shall not include or be affected by any value of the right-of-way granted to the applicant under authority of the regulations of this part.

(2) The Department of Energy shall be allowed to utilize for the transmission of electric power and energy any surplus capacity of the transmission facility in excess of the capacity needed by the holder in connection with the holder's operations, or to increase the capacity of the transmission facility at the Department's expense and utilize such increased capacity for the transmission of electric power and energy. The utilization of surplus or increased capacity shall be subject to the following terms and conditions:

(i) When the Department of Energy desires to utilize surplus capacity thought to exist in the transmission facility, notification shall be given to the holder, and the holder shall furnish to the Department of Energy within 30 days a certificate stating whether the transmission facility has any surplus capacity not needed by the holder for the transmission of electric power and energy in connection with the holder's operations and, if so, the amount of such surplus capacity.

(ii) Where the certificate indicates that there is no surplus capacity or that the surplus capacity is less than that required by the Department of Energy, the authorized officer may call upon the holder to furnish additional information upon which its certification is based. Upon receipt of such additional information, the authorized officer shall determine whether surplus capacity is available, and if so, the amount of such surplus capacity.

(iii) In order to utilize any surplus capacity determined to be available, or any increased capacity provided by the Department of Energy at its own expense, the Department of Energy may interconnect its transmission facilities with the holder's transmission facility in a manner conforming to approved standards of practice for the interconnection of transmission circuits.

(iv) The expense of interconnection will be borne by the Department of Energy which shall at all times provide and maintain adequate protective equipment to insure the normal and efficient operation of the holder's transmission facilities.

(v) After any interconnection is completed, the holder shall operate and maintain its transmission facilities in good condition, and except in emergencies, shall maintain in a closed position all connections under the holder's control necessary for the transmission of the Department of Energy's power and energy over the holder's transmission facilities. The parties may, by mutual consent, open any switch where necessary or desirable for maintenance, repair or construction.

(vi) The transmission of electric power and energy by the Department of Energy over the holder's transmission facilities shall be effected in such manner as shall not interfere unreasonably with the holder's use of the transmission facilities in accordance with the holder's normal operating standards, except that the Department of Energy shall have the exclusive right to utilize any increased capacity of the transmission facility which has been provided at the Department of Energy's expense.

(vii) The holder shall not be obligated to allow the transmission of electric power and energy by the Department of Energy to any person receiving service from the holder on the date of the filing of the application for grant, other than statutory preference customers including agencies of the Federal Government.

(viii) The Department of Energy shall pay to the holder an equitable share of the total monthly cost of that part of the holder's transmission facilities utilized by the Department for the transmission of electric power and energy. The payment shall be based on an amount in dollars representing the same proportion of the total monthly cost of such part of the transmission facilities as the maximum amount in kilowatts of the power transmitted on a scheduled basis by the Department over the holder's transmission facilities bears to the total capacity in kilowatts of that portion of

the transmission facilities. The total monthly cost shall be determined in accordance with the system of accounts prescribed by the Federal Energy Regulatory Commission, exclusive of any investment by the Department of Energy in the part of the transmission facilities utilized by the Department.

(ix) If, at any time subsequent to a certification by the holder or determination by the authorized officer that surplus capacity is available for utilization by the Department of Energy, the holder needs the whole or any part of this capacity theretofore certified or determined as being surplus to the needs of the holder, the holder may request the authorized officer to modify or revoke the previous certification or determination by making application to the authorized officer not later than 36 months in advance of the holder's needs. Any modification or revocation of the certification or determination shall not affect the right of the Department of Energy to utilize facilities provided at its expense or available under a contract entered into by reason of the equitable contract arrangements provided for in this paragraph.

(x) If the Department of Energy and the holder disagree as to the existence or amount of surplus capacity in carrying out the terms and conditions of this paragraph, the disagreement shall be decided by a board of three persons composed as follows: The holder and the Department of Energy shall each appoint a member of the board and the two members shall appoint a third member. If the members appointed by the holder and the Department of Energy are unable to agree on the designation of the third member, he shall be designated by the Chief Judge of the United States Court of Appeals of the circuit in which the major share of the facilities involved is located. The board shall determine the issue and its determination, by majority vote, shall be binding on the Department of Energy and the holder.

(xi) As used in this section, the term "transmission facility" includes (a) all types of facilities for the transmission of electric power and energy and facilities for the interconnection of such facilities, and (b) the entire transmission line and associated facilities from substation or interconnection point to substation or interconnection point, of which the segment crossing the lands of the United States forms a part.

(xii) The terms and conditions prescribed in this paragraph may be modified at any time by means of a supplemental agreement negotiated between the holder and the Department of Energy which agreement shall be concurred in by the Secretary of the Interior.

Subpart 2806—Designation of Right-of-Way Corridors

§ 2806.1 Corridor designation.

(a) The authorized officer may, based upon his/her motion or receipt of an application, designate right-of-way corridors across any public lands in order to minimize adverse environmental impacts and the proliferation of separate rights-of-way. The designation of corridors shall not preclude the granting of separate rights-of-way over, upon, under or through the public lands where the authorized officer determines that confinement to a corridor is not appropriate.

(b) Any existing transportation or utility right-of-way that is capable of accommodating an additional compatible right-of-way may be designated as a right-of-way corridor by the authorized officer without further review. Subsequent right-of-way grants shall, to the extent practical and as determined by the authorized officer, be confined to designated corridors.

(c) Upon a determination by the authorized officer and based upon the criteria of § 2806.2 of this title, a right-of-way corridor shall be designated by publication of a notice in the Federal Register.

§ 2806.2 Designation criteria.

The locations and boundary designations of right-of-way corridors shall be determined by the authorized officer after a thorough review of:

(a) Federal, State and local land-use plans and applicable Federal and State laws.

(b) Environmental impacts on natural resources including soil, air, water, fish, wildlife, vegetation and on cultural resources.

(c) Physical effects and constraints on corridor placement or rights-of-way placed therein due to geology, hydrology, meteorology, soil or land forms.

(d) Economic efficiency of placing a right-of-way within a corridor, taking into consideration costs of construction, operation and maintenance, and costs of modifying or relocating existing facilities in a proposed corridor.

(e) National security risks.

(f) Potential health and safety hazards to the public lands users and the general public due to materials or activities within the right-of-way corridor.

(g) Engineering compatibility of proposed and existing facilities.

(h) Social and economic impacts of the facilities on public lands users, adjacent landowners and other groups or individuals.

§ 2806.2-1 Procedures for designation.

(a) The authorized officer shall, to the extent practical, designate right-of-way corridors that are consistent with the Bureau of Land Management's land use plans. In making designations, the authorized officer shall consult with Federal, State, and local agencies, local landowners, and other interested user groups in a manner that provides an opportunity for interested parties to express their views and have those views considered prior to corridor designation.

(b) The authorized officer shall take appropriate measures to inform the public of designated utility transportation corridors, so that existing and potential right-of-way applicants, governmental agencies and the general public will be aware of such corridor locations and any restrictions applicable thereto. Public notice of such designations may be given through publication in local newspapers or through distribution of planning documents, environmental impact statements or other appropriate documents.

Subpart 2807.7—Reservation to Federal Agencies

§ 2807.1 Application filing.

A Federal agency desiring a right-of-way or temporary use permit over, upon, under or through the public lands pursuant to this part, shall apply to the authorized officer and comply with the provisions of subpart 2802 of this title to the extent that the requirements of subpart 2802 of this title are appropriate for Federal agencies.

§ 2807.1-2 Document preparation.

(a) The right-of-way reservation need not conform to the agency's proposal, but may contain such modifications, terms, conditions or stipulations, including changes in route or site location, as the authorized officer determines appropriate.

(b) All provisions of the regulations contained in this part shall, to the extent possible, apply and be incorporated into the reservation to the Federal agency.

§ 2801.7-2 Reservation termination and suspension.

The authorized officer may suspend or terminate the reservation only in accordance with the terms and conditions of the reservation, or with the consent of the head of the department or agency holding the reservation.

2. The following are deleted: (a) Subpart 2811 of part 2810; (b) Subpart 2822 or part 2820; (c) Part 2840; (d) Part 2850; (e) Part 2860; (f) Part 2870; (g) Part 2890; (h) All appendices to group 2800.

Cecil D. Andrus,

Secretary of the Interior.

October 2, 1979.

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